IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-817396-D1 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Fernando SEGARRA

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1854

Fernando SEGARRA

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 22 October 1970, an Examiner of the United States Coast Guard at New York, N.Y. revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a wiper on board SS SANTA MERCEDES under authority of the document above captioned, Appellant:

(1) on or about 16 August 1970, at sea, wrongfully exposed his private parts to two female passengers;

(2) on or about the same date, at sea, wrongfully made lewd and suggestive motions to two female passengers, "whenever you saw yourself observed by them;"

(3) on or about 15 August 1970, at sea, wrongfully exposed his private parts to two female passengers; and

(4) on or about the same date, at sea, wrongfully made lewd and suggestive motions to two female passengers "whenever you saw yourself observed by them."

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of two witnesses and voyage records of SANTA MERCEDES.

In defense, Appellant offered in evidence his sworn affidavit and, in effect, unsworn testimony by a privately procured interpreter.

At the end of the hearing, the Examiner rendered a written

decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 13 November 1970. Appeal was timely filed on 17 November 1970. Although Appellant had until 22 February 1971 to perfect his appeal, he has not added to his original statement of grounds for appeal.

FINDINGS OF FACT

On 15 and 16 August 1970, Appellant was serving as a wiper on board SS SANTA MERCEDES and acting under authority of his document while the ship was at sea.

Because of the disposition to be made of this case, no further findings of fact are made.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that denial of the services of an interpreter denied Appellant due process in this case.

APPEARANCE: Fields, Rosen, McElligott & Auslander, New York, N.Y., by Samuel I. Ackerman, Esq., of Counsel.

OPINION

I

Appellant did not express a desire for an interpreter until after the Investigating Officer had completed his case. The Examiner ruled that it would be inappropriate for the Examiner's Spanish speaking secretary to act for Appellant. The Examiner granted two adjournments. At the session of the hearing between the two adjournments, the Examiner said "... while you understood me, you had difficulty in expressing yourself in English." R-38.

I am far from convinced that Appellant's command of English was so poor that use of an interpreter was essential, and I believe that had this hearing been conducted in its entirety in the way in which a large part of it was conducted it could be held that absence of an interpreter was no error. Unfortunately, certain conduct of both the Investigating Officer and the Examiner belies the statement that "you understood me," and gives the appearance that during the critical stage of the hearing, the taking of testimony of the witnesses against Appellant, the absence of an interpreter may have been a denial of due process.

When the Investigating Officer served the charges and notice of hearing on Appellant on 27 August 1970 he brought Appellant from the New York Marine Inspection Office on the Battery Park Building to the Customs House, where the Examiner's office is located, and enlisted the services of the Examiner's secretary to explain to Appellant his rights and to read the charges to him in Spanish.

Even before this was disclosed on the record, the Examiner had qualms about whether his own explanation of Appellant's rights had been understood, and he used his secretary to pose three questions to Appellant in Spanish on the basic matters of knowledge of right to counsel, informed waiver of the right, and the desire to proceed as his own representative. R-2, 3. It appears anomalous that having utilized an "interpreter" on the matter of right to counsel the Examiner then proceeded to advise Appellant in English with no intermediary about more abstruse concepts such as "burden of proof," the procedure for taking testimony by deposition, and Appellant's status as a competent but non-compellable witness.

After the Investigating Officer had rested, but before Appellant had indicated a desire for an interpreter the Examiner again saw fit to call his secretary to discuss matters with Appellant. R-34. In an off-the-record discussion it appears that the secretary told the Examiner in English what Appellant had told her in Spanish. Another anomaly appears in that, back on the record, the Examiner called upon Appellant to acknowledge that the Examiner's summary in English of what the secretary had said off the record was correct.

When Appellant first expressed a desire for an interpreter at R-36, what he actually asked was that the Examiner's secretary be recalled. It appears that there was unrecorded conversation between Appellant and the Investigating Officer, because the Investigating Officer said:

> "First he wants to be explained better what testify in his own behalf is. He might want to do that but I can't quite get it across to him."

The Examiner denied the use of his secretary for this purpose and suggested that Appellant get his own interpreter. The difference between explaining the right to counsel and explaining the right to testify is not so apparent that it necessarily follows that it would be correct to use the secretary for one purpose and not for the other; nevertheless, the Examiner once more utilized the secretary for his own purpose to ascertain that Appellant wanted an adjournment. R-37.

At reconvening, the Examiner again communicated with Appellant through his secretary, off the record, to ascertain that Appellant had prepared an affidavit in English with someone's help.

It is true that Appellant had an "interpreter" of his choice for the presentation of his defense, but on this record it is inescapable that both the Investigating Officer and the Examiner doubted that Appellant understood them because of their sua sponte use from time to time of the Examiner's secretary, and this casts a shadow on the proceedings in which the testimony of two very damaging witnesses was taken. Either an interpreter should have been utilized throughout or no interpreter at all was necessary.

II

It should not be necessary to expound on the use of interpreters, but it is noteworthy that neither "interpreter" was sworn. It is essential that an oath be taken to make exact translations between the two languages involved and to report faithfully in both directions what has been said.

It is also elementary that an interpreter is not permitted to paraphrase or summarize in his own words what was said by either party to a dialogue, although an interpreter may, speaking for himself, point out possible ambiguities. Paraphrase and summary, even made off the record, were permitted here, and neither "interpreter" was sworn.

III

Some unusual procedures were followed in the presentation of Appellant's defense in this case which I cannot overlook both for their importance in this case and their possible deleterious effects in other cases if the practices are permitted to spread.

Appellant's unsworn interpreter placed in evidence, without objection by the Investigating Officer, an affidavit made by Appellant before a notary public. The document was in English. Only Appellant as affiant and the notary public signed the document. The matter was never explored but the record opens the question of whether Appellant made his affidavit in English, or made it in Spanish with the notary public translating into English.

The interpreter did all the talking for Appellant throughout the session except that at one point Appellant himself spoke (R-49) and was told by the Examiner to communicate only through the interpreter. Having entered the affidavit into evidence, the unsworn interpreter went on to give what cannot be construed other than as unsworn testimony (Appellant was not under oath) since he

stated as fact contentions contrary to the testimony of the Investigating Officer's witnesses and introduced statements as to the contents of other documents relative to Appellant's physical condition, documents which the Examiner sighted and acknowledged although he returned them to Appellant without making them exhibits since Appellant would need the documents for continuance of his medical treatment.

When Appellant's interpreter completed his recitation the Examiner unaccountably announced, "I understand this to be an opening statement." R-55. Since Appellant's "interpreter" did not purport that what he had said was a statement of what Appellant intended to prove at a later stage and stated when he had finished that he was finished, it is inconceivable that what was attempted was, however, unskillfully done, other than a defense on the merits and not an "opening statement."

The Examiner announced that this was the "finish" of the case, and said "Then we are up to what is known -- is there anything further by the Government?" It is obvious from this quotation and from what happened shortly thereafter that the Examiner was about to say "Then we are up to what is known as 'summation.'" R-57. (After the Investigating Officer's interruption had been disposed of, the Examiner immediately laid down his "rules of the summation.")

What the Investigating Officer wished to do was question Appellant. The Examiner said that he could not because Appellant had not testified, but had only submitted an affidavit and had made an "opening" statement (which, as we have seen, led directly to final summation). There is no doubt that this procedure was not prejudicial to Appellant, but I cannot approve, by failure to comment, a procedure that would permit introduction into evidence of an ex parte sworn statement from a affiant who is available for cross-examination without also permitting the cross-examination. Especially when the affidavit is that of a person charged it is the duty of the Investigating Officer to seek to bar the entry of this sworn testimony into evidence, unless there is an assurance that the affiant is amenable to cross-examination and I am far from certain that the Examiner did not have a duty to exclude the affidavit on his own motion, without a special notation on the record that acceptance of the affidavit into evidence would automatically subject the person charged--affiant to cross-examination.

IV

I am troubled by the framing of the second and fourth specifications, the appearance in the record of unsolicited

testimony of a witness, the possible prejudice to Appellant that might have occurred because of the acceptance of this evidence without comment or remark, the possible confusion of dates because of the poor ordering of the specifications, and the possibility that an unresolved, undiscussed, discrepancy exists in the evidence against Appellant.

The third specification of misconduct alleged that on 15 August 1970 Appellant had exposed his private parts to two (female) passengers on the vessel. This parallels exactly the allegation of the first specification which alleged a similar act as occurring before two (female) passengers on 16 August 1970. The record makes it clear that the two women were the same on each occasion.

The first and third specifications appear to allege single acts of exposure to the same two passengers on two consecutive dates. The second and fourth specifications (dealing, as we learn from the completed record, with the same two passengers) do not purport to refer to single acts committed in the presence of the two passengers but to a potential series of acts on several occasions on each date, in the presence, it must be assumed on the whole record, of both passengers "whenever you saw yourself being observed by them."

The intrinsic fault of this language is obvious and is not cured by the Examiner's findings which held the specifications proved as alleged. Under the allegations, the burden upon the Investigating Officer was to prove that Appellant "saw" himself "being observed" by the passengers one or more times, but no more than some indefinite number of times. Thus, if the Investigating Officer had offered evidence to prove that the passengers had observed Appellant on five times on each date, the way was open for Appellant to contest that:

(1) on each occasion he had not see himself being observed by the passengers; or

(2) he had seen himself being observed on another occasion when he had not performed the act alleged.

It immediately comes to mind to question why the Investigating Officer chose to couch the indecent exposure specifications in terms limited to a single occurrence on each date while the lewd motions on each date were left open to innumerable, unprovable possibilities.

Speculation is not to be encouraged, but to insure that faults in the instant case are not repeated, I speculate that the specifications were drawn up without precision. The entire thrust

of the specifications and of the hearing intimates, as I shall explore below, that Appellant on one date or the other committed one or more acts of lewd suggestion while on each date he had committed only one act of indecent exposure.

It is incomprehensible that an official authorized to serve charges under R.S. 4450 would be able to investigate a complaint of misconduct and determine that acts of exposure had occurred at identifiable times and not be able to determine that associated acts on the same dates, on their face adjuncts of the exposures alleged, could not be so identified and alleged. It also troubles me that the matter was never raised by the Examiner in the case until he adverts to the chronological reversal of dates in his opinion. The undesirable speculation that I must indulge in here is prompted by the record of testimony of the witness Brown at R-22. The witness had testified as to two occasions, one on each of the dates in question, of lewd gestures and indecent exposure on the part of Appellant. At R-22 the Examiner announces that he is about to release the witness. With no objection from anyone recorded, and with no break in the record, the Examiner says, "Wait one second, I'll make a note." Again without a break in the record the witness states, apparently without question or solicitation:

> "The same night we saw him when we were sitting on the promenade deck we got in touch with Mr. DeFazi later on and he said, "well if you see him again it will probably be about the time the crew go for their meals, their nighttime meal," dinner as we would call it... We called Mr. DeFazi, and Mr. DeFazi came down with Mr. Kagan, and Mr. Kagan came from the port side and Mr. DeFazi came from the starboard side and they caught him directly beneath the window."

It is clear that this testimony deals with events of 16 August 1970. Between the testimony in the record and the findings of the Examiner I gather that:

(1) Mrs. Brown saw Appellant from her window at about noon, at which time Appellant "motioned her to come out on deck" (Examiner's finding #5).

(2) Mrs. Brown and Miss Fallon shortly thereafter, while sitting on the promenade deck saw Appellant again expose himself (Examiner's finding #6); and

(3) that evening, Mrs. Brown, from the window, saw Appellant "attempting to attract the attention" of Mrs. Brown.

This third conclusion is based on Examiner's finding #8 (in which he used the words "attract the attention of these women"), and Miss

Fallon's testimony that on this occasion she did not see Appellant at all but that she telephoned the Chief Engineer when Mrs. Brown told her that she saw Appellant down on deck.

No matter which of the three episodes of 16 August 1970 is being considered at any one time, it is clear that on two occasions, the first and third, the observation of Appellant was by Mrs. Brown alone, and the Examiner's findings of fact that Appellant motioned to Mrs. Brown to come out on deck do not, without more, support a finding that Appellant made "lewd and suggestive motions" to Mrs. Brown much less that he made "lewd and suggestive motions to two female passengers."

CONCLUSION

I consider as highly questionable the manner in which the apparently unsolicited testimony of the witness Brown concerning the events of the evening of 16 August 1970, which would tend to tie Appellant's conduct to his "apprehension" by ship's officers, entered the record when the Examiner was apparently making a note after it had been agreed that the witness could be released.

I conclude also that many transactions took place in this case which should have been of record which were not recorded, although I have spelled out only one or two of such incidents.

I conclude that the second and fourth specifications were poorly drafted and could not have been found proved as alleged, at the same time noting that a mere motion to a person to come out on deck is not necessarily a "lewd" motion without further explication of the circumstances.

I conclude that an act alleged to have taken place in the presence of and directed toward two passengers cannot be found proved as alleged when the record clearly shows that only one of those persons observed the act, in the circumstances of this case.

I conclude that the sua sponte use of a Spanish speaking employee of the United States as an unsworn interpreter in dealing with Appellant at several critical points selected by the Investigating Officer and the Examiner creates an appearance that the failure to use an interpreter when other equally important matters were under consideration was error.

The combination of all these factors, plus the errors in charges and findings, persuades me that a mere remand is not an adequate solution. The strong evidence adduced cries out for hearing but it must be a hearing on charges on a proper record in which it clearly appears that Appellant's rights are accorded to

him.

ORDER

The order of the Examiner entered at New York, N.Y., On 22 October 1970 is SET ASIDE. The Examiner's findings are also SET ASIDE. The charges are DISMISSED without prejudice to reinstitution of new proceedings.

C. R. BENDER
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 16th day of September 1971.

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